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No. 712

In the
Supreme Court of the United States

OCTOBER TERM, 1965

VELSICOL CHEMICAL CORPORATION, a corporation,
Petitioner,

— VS. —

GOLDEN GATE HOP RANCH, INC., a corporation,
Respondent.

PETITIONER'S BRIEF IN REPLY TO BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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THE ARGUS PRESS SEATTLE, WASHINGTON

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INTRODUCTION

As stated in Petitioner's petition for a writ of certiorari herein, (Pet., p. 2) the questions presented by the petition are two:

1. Whether delivery of summons and complaint to petitioner's comptroller at its main office and place of business in Chicago, Illinois, was effective to confer *in personam* jurisdiction of petitioner on Washington courts under the provisions of the due process clause of the 14th Amendment of the United States Constitution.
2. Whether, constitutionally, a state may subject a foreign corporation to *in personam* jurisdiction of its courts in a case based solely upon alleged tort where the tortious conduct, if any, was completely outside

> the territorial limits of the state and the sole basis for such jurisdiction is the fact that the injury occurred within the state.

The immediate question before the Court at this stage is whether a writ of certiorari should issue to the Supreme Court of the State of Washington for the review of these questions. Therefore, the discussion in this reply will be directed to demonstrating that the petition presents a substantial federal question which greatly needs resolution by this Court. We believe that this case presents a near perfect opportunity for the Court to more precisely describe and define the present standards of state court jurisdiction over non-residents than has been presented since *Hanson v. Denckla*, 357 U.S. 235, 78 S. Ct. 1228, 2 L.ed 2d 1283 (1958).

THIS CASE IS AN IDEAL VEHICLE FOR AN IMPORTANT, CLARIFYING DECISION

Because of the fact that the Washington Supreme Court boldly based its decision on the single premise that injury occurring in Washington, without more, provides a sufficient foundation for assertion of *in personam* jurisdiction over petitioner, an ideal opportunity is presented for the first time for this Court to provide the bench and bar with definitive guide lines in the area of *in personam* state jurisdiction over non-residents. The facts are set out in detail in the petition and are briefly reviewed again here only to correct misleading inferences which have been left by respondent's brief.

The judgment in this case was based solely on the

alleged negligence of the petitioner in writing a letter (Ex. 119B) from Chicago, Illinois, to respondent's parent corporation in New York City. That was the *only act* by petitioner which was found by the jury to be negligent, and it obviously occurred wholly and entirely *outside* the State of Washington. The Washington Supreme Court held petitioner liable on the theory that the alleged tort occurred at the place of the injury, and that no act or conduct of petitioner *within* the state was necessary to the assertion by Washington of personal jurisdiction.

The basis of the Washington Supreme Court's holding is plain from the following words of its opinion (Appendix A to Petition, p. 2a):

> "The act upon which liability in this case was predicated was the writing and mailing of a letter from the Chicago office of the appellant corporation, recommending the use of heptachlor on hops. The letter was sent to an officer of the respondent corporation's parent corporation in New York. The appellant contends that, since this act did not occur in this state, the requirements of the statute were not met.
>
> "However, in the recent case of *Nixon v. Cohn*, 62 Wn.(2d) 987, 385 P.(2d) 305, we held that, where damages result from negligence of a defendant, the injury occurring in this state is an inseparable part of the 'tortious act,' as the term is used in the statute. Consequently, the respondent brought itself within one of the subdivisions of the act and was entitled to take advantage of its provisions."

It is important to note that the letter from respondent's parent corporation (in New York City) to petitioner (in

Chicago) (Ex. 119A) requested information relating to the Miller Amendment to the Food, Drug and Cosmetic Act (21 U.S.C. §346 a-b), which is concerned with chemical residues on plants which are harmful to *human beings*. Contrary to the intimation of respondent in its brief (pp. 6-7), there is nothing in the record, anywhere, to indicate that respondent ever requested any information relating to the effect of a heptachlor formulation on *crops or soil*. Exhibits 119A and 119B are the only communications ever exchanged by petitioner and anyone connected with respondent. Clearly Mr. Gimbel's letter was not concerned with damage to plants or soils. (These letters are set forth in full in respondent's brief at pp. 7-9). Nor do respondent's citations to the record at pages 6-7 of its brief support the contention that Mr. Gimbel was so concerned. St. 119-23 contains no testimony which would show or even indicate what Mr. Gimbel's concern was. St. 1656-57, together with St. 1663, indicates that the danger to human beings from chemical residues (the subject of the Miller Amendment) was Gimbel's *only* concern. Petitioner's product, heptachlor, was *not* defective, but rather was true in all respects to its label and in full and complete compliance with 7 U.S.C.A. §135. That statute, cited by respondent, is entirely unrelated to the Miller Amendment. We emphasize the foregoing facts because it is important to note that in all of the tort cases relied on by respondent in which personal jurisdiction over non-residents was sustained, there was involved

either a *defective* product or *intentionally* tortious conduct.

The opinion of the Washington Supreme Court accurately stated (Pet., Appendix A, p. 7a.)

> "It is true that in this case there was no negligence in the manufacture of the product and no defect in the product itself . . . ."

PETITIONER DID NOT HAVE THE REQUIRED "MINIMAL CONTACTS" WITH WASHINGTON

The Washington Supreme Court found it "not necessary for us to decide" whether petitioner's other activity in Washington amounted to the transacting of business within the State of Washington, as that classification is set forth in the Washington "long-arm statute" (R.C.W. 4.28.185). As we will discuss further below, the record here is devoid of evidence showing that the isolated sporadic contacts between petitioner and Washington were sufficient to constitute the transaction of business or that such contacts had anything whatever to do with respondent's cause of action.

As to both the "commission of a tortious act" and the "transaction of any business" classifications, the Washington statute requires that the act or conduct which is tortious or which constitutes the transaction of business *must take place in the State of Washington*, and that the local plaintiff's cause of action *must arise from* such in-state act or conduct. R.C.W. 4.28.185 (1)(a) and (b) and (3).

The Washington statute is a verbatim copy of the Illinois Statute. (Ill. Rev. Stat. 1959, Chap. 110, par. 17). Both of these statutes were enacted in 1959 after the decision by this Court in *Hanson v. Denckla,* 357 U.S. 235, 78 S. Ct. 1228, 2 L.ed 2d 1283 (1958). The legislators who adopted those laws appear in each instance to have conscientiously followed the requirement discussed in *Hanson v. Denckla* that the plaintiff's cause of action *arise out of* the defendant's forum state activity before subjecting the non-resident defendant to jurisdiction.

It is petitioner's contention that the construction of the Washington "long-arm statute," as applied to the petitioner by the opinion of Washington's Supreme Court, violated the due process requirements of the 14th Amendment to the United States Constitution. As to the "tortious act" holding, where all of the alleged tort feasor's conduct occurs *out of* the forum state *and its sole contact with the state is the fact that the injury took place there,* the "minimal contacts" requirement laid down by *International Shoe Co. v. Washington,* 326 U.S. 310, 66 S. Ct. 154, 90 L.ed 95 (1945), reaffirmed in *Hanson v. Denckla, supra,* and discussed further in *Rosenblatt v. American Cyanamid Co.,* 381 U.S. ____, 86 Ct. 1, 15 L.ed 2nd 39 (1965) is not satisfied. That is true particularly of this case, where the causal relationship between the alleged negligence and the alleged damage is so tenuous, and where the product which caused the damage was not defective but was entirely true to its label.

As to the "transaction of any business" question, which was not ruled upon by the Washington Court, petitioner's slim and isolated contacts, none of which were *in any manner* related to respondent's cause of action, surely cannot rise to the level of the required minimal contacts. While the Washington Court did not so rule, the suggestion by respondent that it would so rule on remand is specious. On the basis of the two isolated visits to this state by petitioner's "missionary," neither of which had any connection with respondent's cause of action, a holding by the Washington Supreme Court that petitioner's conduct constituted the "transaction of business" would be as violative of the due process requirements of the 14th Amendment as is the decision at which the present petition is directed.

Respondent attempts to make much of the fact that one Howard Beaudoin represented the petitioner in Washington and infers that this representation was somehow connected, as required by the Washington "long-arm statute," with respondent's cause of action. Nothing could be farther from the truth. Mr. Beaudoin made *at most* two trips to Washington prior to the alleged tort in 1956 (St. 3, 1939, 1957) and when he came to Washington he was not engaged in any *sales* effort whatever (St. 10, 17). Nor did Beaudoin call on *anyone* (let alone an ultimate and remote consumer such as respondent) for the purpose of making sales. Nor was Crop King Co. (the middleman in the ultimate sale to respondent) a customer of Beaudoin's

or of petitioner's, as respondent obliquely suggests; in fact, petitioner sold heptachlor only to formulators, *none of which were in Washington* (St. 17, 1955-6), and *refused* to sell to Crop King (St. 1963, 2087). Petitioner had never sold heptachlor with the intent that it be used on hops (2294). Beaudoin testified that he had never recommended heptachlor to anyone for use on hops (St. 1946) and that he told jobbers *not* to sell heptachlor formulations for hop use (St. 1947-8, 1953). A reading of Beaudoin's affidavits (St. 3, 15) and his deposition (St. 1921) will demonstrate that the record is completely *devoid* of any evidence connecting Beaudoin's two Washington visits with respondent or with its cause of action.

At pages 4-5 of respondent's brief, an attempt is made to connect petitioner with the State of Washington through a Dr. Klostermeyer, who it is claimed obtained information from a western Washington experimental station to which petitioner at some unspecified time in the past had given some money to assist it in experiments, and that Dr. Klostermeyer conveyed this information in a memorandum, E.M. 21 (Ex. 24), to a private group of farmers in Washington. The truth of the matter, however, is that Dr. Klostermeyer, according to his own testimony, obtained the information which went into E.M. 21 from a Dr. Rosensteil at *Oregon* State University (St. 2100), and *not* from any source in Washington or from petitioner (St. 2099). Nowhere in the record is there any testimony that petitioner was at any time connected with Dr. Rosensteil

or with Oregon State University. Nor is there any testimony that respondent ever received or used any information supplied to it by Dr. Klostermeyer. Any research subsidy by petitioner of a western Washington experimental station had no connection *whatever* with respondent or with its cause of action.

Finally with respect to the facts of this case, which respondent represents, at pages 12-14, to provide the "inevitable link" between petitioner's activities and respondent's use of heptachlor, the truth is that respondent's recitation is but a series full of missing links. It is essential that these facts be set straight in order to show the almost total lack of even the vaguest contact between petitioner and the State of Washington. Our answer to respondent's factual discussion will be in numbered paragraphs corresponding to those used by respondent at pages 12-14 of its brief.

1. Contrary to respondent's assertion, petitioner *at no time sold, nor did it solicit the sale of its product heptachlor to anyone in the State of Washington* (St. 9-14). Petitioner's formulator customers were all located *outside* Washington (St. 17, 1955-6). The citation by respondent to the record (St. 1494-98) makes no reference to sales in the State of Washington.

2. Petitioner did provide a modest grant (under $1,000 sometime between 1953 and 1957 [St. 1975-78]) to Washington State University which operated two agri-

cultural experiment stations in western Washington, at Puyallup and Mt. Vernon, much as other corporations give grants to educational and research institutions all over the United States. Certainly this is not the kind of contact which will render petitioner amenable to Washington jurisdiction, particularly when it is understood that the grant was *in no way whatever* connected with respondent or its cause of action. The record is totally silent as to any such connection.

3., 4. & 5. Howard Beaudoin's contacts with Washington were fully explored above. The range of Beaudoin's activities set forth by respondent were a part of his job as *regional* missionary for Oregon, Washington, Idaho, Montana, Wyoming, Utah, South Dakota, California, Colorado and two Canadian provinces (St. 16). He lived in Portland, Oregon (St. 3). Neither Beaudoin nor petitioner dealt with any formulators in Washington (St. 1955-6, 1963). Further, Beaudoin had made only two trips *at most* to Washington by the time respondent had used a heptachlor formulation. (St. 3, 1939, 1957). As to calls made on Crop King Co., as stated above, *no sales were made by petitioner or Beaudoin to that company* (St. 1934, 1963), and in fact petitioner refused to sell to Crop King or to have it act as one of petitioner's formulators (St. 2072, 2087). Respondent claims to have purchased the insecticide which damaged its hops from Toppenish Hop Growers Supply (Toppenish, Washington), which had acquired the formula-

tion from Crop King Co. (Yakima, Washington), which had purchased it from Miller Products Co. (Portland, Oregon) (Tr. 166). Crop King used its own label (Ex. 34), and there was, according to the testimony of the operator of Crop King Co., no connection between Beaudoin and the formulation containing heptachlor (St. 2086). Petitioner's contact with its product came to an end when it sold it to Miller Products Co. in Portland, *Oregon;* Miller Products then mixed, or formulated, the heptachlor with other ingredients to form the insecticide which eventually found its way, still true to petitioner's original label and under a new label of the distributor, through the hands of several middlemen to respondent's hops. At no time was any claim made that petitioner's product was defective and the Washington Supreme Court correctly observed that it was not (Pet., Appendix A, p. 7a).

6., 7., 8. & 9. These four paragraphs constitute, perhaps, respondent's most obvious misstatement of the facts. Dr. Klostermeyer's connection with petitioner was non-existent by his own testimony (St. 2099-100). Furthermore, his collection of the data which he put in the bulletin (Ex. 24, 105) was not even remotely connected with petitioner, whether directly, through some obscure grant-in-aid relationship to Washington State University or its experiment stations, or otherwise. That data, by Dr. Klostermeyer's own testimony (St. 2100) came entirely from a paper written by a

professor in *Oregon* and the record contains no hint of any connection between that data and the petitioner. It should be noted that Howard Beaudoin had not appeared on the scene in this region (the Pacific Northwest) until *after* this bulletin was published, despite respondent's obvious liberties with the chronology. Nor is there any evidence in this case that respondent was in any way influenced by Dr. Klostermeyer's bulletin to use the heptachlor formulation.

10. & 11. These paragraphs involve the two letters (Ex. 119A and B) exchanged between petitioner, in Chicago, and respondent's parent corporation in New York, and obviously involve no activity in the State of Washington. This matter is discussed in detail above, and it is sufficient here to restate simply that the letters pertained only to chemical residues on crops which might be harmful to *humans*, not to any problem related to *crop damage*. No representation about its safety as to crops was requested or made; petitioner's letter merely answered the question raised by respondent's letter. Both letters are set out in respondent's brief at pp. 7-9.

12., 13. & 14. These paragraphs do not even purport to show any contact between petitioner and respondent or between petitioner and the State of Washington.

In summary the best effort which can possibly be truthfully mustered by respondent to show that petitioner en-

gaged in the transaction of business in Washington, *which transaction gave rise to petitioner's cause of action* is:

1. Petitioner employed a "missionary" who lived in Oregon and who made at most two trips to Washington for the purpose of calling on county agents and distributors of heptachlor formulations manufactured by others. His concern was solely with the use of heptachlor formulations on crops for which it had been properly cleared, and he *never* recommended the substance for use on hops (St. 1946). He conducted *no* sales transactions in this state and did not even know of respondent's existence until this lawsuit was started.

2. Petitioner once gave money to Washington State University which operated experiment stations. No link was established between anything done by these institutions and the facts of this case; that grant-in-aid was wholly unconnected with respondent and this lawsuit.

That is the full extent of petitioner's contact with the State of Washington. Respondent says in its brief at page 16:

> "Thus, even if this court were to review jurisdiction based upon the commission of a tortious act within the State of Washington because the fact of damage occurred there, and even if the Court determined that this exceeded constitutional limitations, all that could result would be a referral of the case back to the Supreme Court of the State of Washington for its determination of whether there had been sufficient activities to constitute the transaction of business within the state. From the cited portion of the

opinion it is fairly clear as to what the decision of the Washington Supreme Court would be!"

While we disagree violently with the above prediction as to what the Washington Court might hold, if it is true it is doubly important for this Court to review this case, for no other case, state or federal, has yet sustained "long-arm" jurisdiction based on so few or such tenuous contacts nor has any court, including this one, ever held that conduct by a non-resident corporation, as sporadic and limited as that above described, constituted the transaction of business sufficient to subject it to jurisdiction.

"TORTIOUS ACT" vs. "COMMISSION OF A TORT IN WHOLE OR IN PART"

The Washington Supreme Court upheld state jurisdiction in this case solely on the theory that the place of injury determines the situs of the tort and that since the situs is in Washingon, petitioner's Chicago-to-New York letter (Ex. 119B) constituted "the commission of a tortious act within this state" (R.C.W. 4.28.185(1)(b)). Thus, this case must be distinguished from those "tortious conduct" cases in which the non-resident defendant committed a physical tortious act *within* the forum state. Care must also be taken to distinguish between state "long-arm" statutes. Some, like the Washington and Illinois (Ill. Civ. Prac. Act. §§ 16, 17) statutes require the commission of a tortious act, some physically present conduct, within the forum state. Others, like the West Virginia (W.V.C., Ch. 31, Art. 1, §71) and Minnesota (Minn. Stat. Ann., § 303.13(1)(3)), acts re-

quire only the "commission of a tort, in whole *or in part,*" within the forum state.

At least two federal district court cases, involving both types of "long-arm" language, have denied state jurisdiction where the only contact between the non-resident and the forum state was out-of-state conduct resulting in injury within the forum.

In *Mann v. Equitable Gas Co.*, 209 F. Supp. 571 (N.D. W.Va., 1962) the court was concerned, as was the Washington Supreme Court in this case, *solely* with out-of-state conduct resulting in forum-state injury. The West Virginia statute, however, required only the commission of the tort "in whole *or in part*" within West Virginia, rather than the commission by the non-resident of *a tortious act* within the state. Even under this more liberal "long-arm" statute, the court held there was no jurisdiction, for the reason that this relationship did not provide the minimal contacts required in *International Shoe, supra.*

The non-resident defendant in *Mann* was a Texas corporation (Peerless) which manufactured gas pipe and sold it throughout the United States. It was alleged that this defendant had negligently manufactured some pipe, sold it through its usual channels and that due to a defect in the pipe, the plaintiff was injured by an explosion in West Virginia. The court said:

> "I find that the facts before me, including the allegations of the complaint, do not establish the necessary minimal contacts required for due process, and that

> this Court has not acquired jurisdiction to render a personal judgment against Peerless by such substituted service, for two reasons: First, Peerless did not commit a tort, in whole or in part, in West Virginia; Second, *if under the place of effect theory of choice of law, the negligent manufacture of the segment of pipe in Texas and its use in West Virginia by a purchaser constitutes the commission of a tort in West Virginia by the manufacturer, there would still be lacking the minimal contacts to constitute due process of law.* . . . I am not unmindful that the place of effect theory of choice of law is the majority view as to the law governing torts, but to apply such theory to a statute like this is unsound, and *results in an extraterritorial application of law in derogation of due process.*" 209 F. Supp. at 573-74. (Emphasis added.)

The Court also refused to hold even that the defendant had committed a tort, in whole *or in part*, in West Virginia. It is even clearer that the defendant did *not* commit a tortious *act* in West Virginia.

The *Mann* case is this case, except for the statutory language; and that difference should impose a more difficult burden for the respondent here in obtaining jurisdiction in Washington than confronted the plaintiff in *Mann* in West Virginia. Certainly the writing of a letter from Illinois to New York, whether negligent or not, is not the commission of a tortious *act* in Washington. Even more certainly, any injury resulting in Washington from such a letter cannot alone constitute the minimal contacts necessary to jurisdiction. Yet that is what the Washington Court has held. By ignoring the plain requirement of the Washington statute (and *Hanson*) that the cause of action *arise out of some conduct or transaction in this state* the Washington Court has

exceeded the permissible limits required by the due process clause of the 14th Amendment.

Another case which reaches the same result is *Pendzimas v. Eastern Metal Prod. Corp.*, 218 F. Supp. 524 (D. Minn., 1961). There the Court was dealing with the West Virginia-type statute, and held that the sale in New York by the non-resident defendant *directly to the wholesale distributor* in Minnesota was not a sufficient contact with Minnesota to render defendant amenable to jurisdiction there. Recognizing that the Minnesota Supreme Court would probably have ruled the other way, the District Court said:

> "However, it is difficult, consistent with the teachings of the weight of authority, to find any support for the fiction that, by reason of a single sale of merchandise to a Minnesota wholesaler consummated in another State, a negligent foreign corporation, *without more*, has therefore by a so-called voluntary act, brought this litigation into being in this State and subjected itself to process herein because here the last event took place which would make it liable for its tort." 218 F. Supp. at 527;

and

> "the Court would . . . be making an alarming departure from the reasoning to be found in the great weight of applicable authority [citing cases] in the event the Minnesota statute on this showing were held to be non-violative of the due process clause of the Federal Constitution. *I do not understand that the mere enactment of a State statute expands the concepts of doing business so as to create power in that State over a foreign corporation beyond the standards of jurisdictional due process.*" 218 F. Supp. at 529. (Emphasis added.)

That is precisely the impact of the holding of the Washington Supreme Court in this case, in the face, however, of an even more stringent "long-arm" statute and in the absence of a direct sale, wherever completed, between petitioner and the respondent.

The case upon which respondent seems to rely almost entirely, *Aftanase v. Economy Baler Co.*, 343 F.2d 187 (8th Cir. 1965) seems by its language, if not by its result, to support petitioner. While construing the same Minnesota statute involved in *Pendzimas, supra,* (which is more liberal than the Washington statute), the Court considered several cases, including *Pendizmas,* without criticism, and then found that in the *particular* case before it, there were sufficient contacts to meet the requirements of due process. But the facts of *Aftanase* are far different from those of the present case. There the defendant had a long history of selling and shipping its machinery *directly* to residents in Minnesota, whose orders were obtained through independent Minnesota sales agents; it sold repair parts and sent parts lists and brochures *directly* into Minnesota; the machine causing the injury was *defective* when shipped by defendant; the defendant voluntarily placed these machines *directly* into channels of commerce to Minnesota and knew the exact destination of the machines. These contacts are entirely missing from the case at bar, and were not relied upon by the Washington Court.

Clearly the Washington Supreme Court has exceeded the

permissible bounds of due process in holding that tortious conduct out of state, resulting in forum-state injury, *alone*, is sufficient under the Washington statute to create *in personam jurisdiction* over petitioner.

THE PRESENT CONFLICT IN THE LAW

Beginning with *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L.ed 95 (1945), the restrictions on state jurisdiction over non-residents were substantially relaxed. But it is clear, even from *International Shoe* that the relaxation of these restrictions did not constitute their elimination. This Court in *Hanson v. Denckla*, 357 U.S. 235, 78 S. Ct. 1228, 2 L.ed 2d 1283 (1958), makes it clear that there are still limitations on the exercise of state jurisdiction over non-residents. There, in recognizing the effect of *International Shoe*, *Travelers Health Ass'n v. Virginia*, 339 U.S. 643, 70 S. Ct. 927, 94 L.ed 1154 (1950), *Perkins v. Benquet Consol. Min. Co.*, 342 U.S. 437, 72 S. Ct. 413, 96 L.ed 485 (1952), and *McGee v. International Life Ins. Co.*, 355 U.S. 220, 78 S. Ct. 199, 2 L.ed 223 (1957), this Court said:

> "But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. . . . Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. *They are a consequence of territorial limitations on the power of the respective States.* However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the 'minimal contacts' with that State that are a prerequisite to its exercise of power over him." 2 L.ed 2d at 1296 (Emphasis added.)

Somewhere between the *International Shoe* "minimal contacts and the *Hanson* pronouncement lies the line which separates situations of permissible state jurisdiction from those situations where such jurisdiction is precluded by the requirements of due process. The location of that line is the subject of a great deal of controversy among the members of the bench and bar in the United States, as evidenced by the conflicting views of the many authors of legal writings on the subject, (see MOORE'S FEDERAL PRACTICE § 4.25(1)-(5)), and even more dramatically by the head-on conflict in the case law.

This case-law conflict is described in the petition, beginning at page 8. Respondent attempts in its brief to suggest that the conflict is only illusory. For instance, respondent contends there is no conflict between *Velandra v. Regie National des Usines Renault*, 336 F.2d 292 (6th Cir. 1964) and *Regie National des Usines Renault v. Superior Court*, 208 Cal. App.2d 702, 25 Cal. Rptr 530 (1964). Yet a reading of these two cases shows clearly that Renault occupied the same relationship with respect to the forum state in each case and that the Court of Appeals in *Velandra* recognized that the facts were analogous in each case. The results in the two cases are opposite, the Sixth Circuit having viewed the law differently than the California Court, and they are in obvious conflict.

This conflict is frequent between the state courts (which tend to uphold the assertion of state jurisdiction over non-

residents) and local federal courts, which, perhaps more sensitive to federal due process implications, tend to deny such jurisdiction. Respondent in its brief (p. 19-20) attempts to show that no real conflict exists between this case, as decided by the Washington Supreme Court, and the related cases involving petitioner decided by the U.S. District Court of the Eastern District of Washington. Respondent says that the federal court's decision is not pertinent "because the motion to quash was ruled upon by the District Court before respondent had completed its discovery and had learned of the scope of petitioner's activities within this state." But as is clear from the District Court's opinion, set forth in full in the petition (pp. 13a-22a), the contacts between petitioner and the State of Washington which *were assumed by the Court* were even broader and more substantial than the respondent was able to prove at the trial of this case, *after its discovery had been completed.*

As a result of the decision of the court below, the opinions of the Washington Supreme Court seem to now be in conflict on this very issue. *Tyee Constr. Co. v. Dulien Steel Prod., Inc.*, 62 Wn.2d 106, 381 P.2d 245 (1963) carefully reviewed the case authority in this field and announced a three-part test for judging the assertion of jurisdiction under the same "long arm" statute here involved:

> "Against the backdrop of these decisions, and within the framework of our statute, it would appear reasonable, however, to conclude that there are three basic factors which *must coincide* if jurisdiction is to be entertained. Such would appear to be: (1) the nonresident

> defendant or foreign corporation must *purposefully* do some act or consummate some transaction *in the forum state;* (2) the cause of action *must arise from, or be connected with,* such act or transaction; and (3) the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature, and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and the basic equities of the situation." 62 Wn.2d at 115-16 (Emphasis added.)

The *Tyee* case involved the performance of a contract, made between Dulien Steel Products, Inc., a Washington corporation, and Belyea (the non-resident) whereby Belyea undertook to find a buyer for some electrical generators, and did sell them to a New York corporation. In the course of this performance, Belyea dealt with Dulien, in Washington, by telephone and mail, and by sending its inspection agents to Washington to oversee the sale and shipping of the generators and to participate in the dismantling of the generators. Clearly, such contacts brought Belyea much closer to the state of Washington than does anything shown in the present case with respect to petitioner. Yet when the Court reviewed the facts it found that, although the defendant had purposefully performed some acts within the state of Washington, that because the action did not arise directly from those acts, the "assumption of in personam jurisdiction over Belyea in this action would offend 'traditional notions of fair play and substantial justice' within the contemplation of the due process clause." 62 Wn.2d at 118.

In making that judgment as to the due process question the Court considered that Belyea's principal place of business was in New Jersey (petitioner's is in Illinois); the transaction which was conducted by Belyea in Washington was an "isolated business excursion" into this state (comparable perhaps to Beaudoin's two "excursions," but more extensive); the transaction involved no systematic or continuing service in Washington by Belyea (there is not even the *allegation* here, let alone proof, that petitioner provided any systematic continuing service); the presence of any agents of Belyea in Washington was *incidental*, rather than *essential*, to the transaction (the presence of petitioner's employee, Howard Beaudoin, was totally unconnected with respondent's cause of action; that presence was not even incidentally connected).

Respondent relies heavily on *Aftanase v. Economy Baler* Co., 343 F.2d 187 (8th Cir. 1965). That decision, however, graphically shows the conflict which exists between the 8th Circuit *(Aftanase)* and the 6th Circuit *(Velandra v. Regie National des Usines Renault, supra)*. In both cases, the defendant manufactured machinery, outside the forum state, which was regularly sold to consumers within the forum state. In each case, the plaintiff was injured by an allegedly defective machine. In *Aftanase* the 8th Circuit upheld the assertion of jurisdiction; in *Velandra* the 6th Circuit refused it. Certainly there were differences in the facts of the two cases as to the contacts of the defendants with the respective States. But these differences were not substantial. Indeed,

upon reading the cases, one gets a distinct impression that the contacts in *Velandra* were somewhat more substantial than those in *Aftanase*, in that, in *Velandra*, Renault dealt through a wholly owned subsidiary physically and legally *resident in the forum state*, while the *Aftanase* defendant merely dealt through independent agents.

The most recent expression of opinion from one member of this Court is the Opinion in Chambers dated July 13, 1965, by Mr. Justice Goldberg in *Rosenblatt v. American Cyanamid Co.*, 381 U.S. ____, 86 S. Ct. 1, 15 L.ed 2d 39 (1965).

In distinguishing the *Rosenblatt* situation from *Hanson v. Denckla*, Justice Goldberg clearly draws a line, which if applied to this case requires the holding that petitioner was not amenable to Washington jurisdiction. In making that distinction, the opinion notes two important differences between *Rosenblatt* and the cases where jurisdiction was denied: (1) "the foreign defendant was never physically present in the forum State," and (2) "the tortious act there was unintentional." 15 L.ed 2d at 43. In the present case, the same distinctions apply. The corporate petitioner was never physically present in the State of Washington. The closest it came to such presence was the two isolated trips by its "missionary man" Howard Beaudoin, *neither of which was related in any manner whatever to the respondent or to the cause of action asserted here by respondent.* Secondly, the alleged tortious act was completely and undeniably unintentional. The only alleged tortious conduct of petitioner

consisted of a letter (Ex. 119B) written by petitioner from Chicago, Illinois, to New York City. This letter was written in answer to Mr. Gimbel's request (Ex. 119A), mailed from New York City to Chicago for information about the use of petitioner's insecticide with respect to residues which might be harmful to *human beings. No other act of negligence is involved.* But respondent's cause of action is for injury to *crops and soil, not* to human beings. Clearly, if the exchange of correspondence cited above resulted in damage to respondent's crops, that damage was at worst unintentional on the part of petitioner and could not conceivably be argued to have occurred in the State of Washington.

The opinion further states with respect to *Hanson v. Denckla* that it:

> "does not cast any doubt upon the validity of jurisdiction obtained by a 'long arm' statute, but on the contrary it clearly *supports* New York's assertion of jurisdiction here. In Hanson the Court observed that 'The cause of action in this case is not one that arises out of an act done or transaction consummated in the forum State.' 357 U.S. at 251, 2 L.ed 2d at 1296. What is *essential* in each case, the Court held, is 'that there be some act by which the defendant *purposefully* avails itself of the privilege of conducting activities within the forum State . . .' 357 U.S. at 253, 2 L.ed 2d at 1298. Currie has interpreted and generalized the Hanson test as a requirement 'that the defendant must have taken *voluntary* action *calculated to have an effect in the forum state.*' Currie, op cit. at 549. Clearly appellant's conduct here meets all of these tests." 15 L.ed 2d at 44 (Emphasis added.)

Clearly the present case does *not* meet even one of the above tests. It is a case which should, but in its appellate

history thus far does not, follow the result of *Hanson v. Denckla.*

That there is substantial and troublesome conflict in this area of the law is obvious from the language of the decisions. *Aftanase v. Economy Baler Co., supra,* the case upon which respondent relies in its attempt to show there is no conflict, states:

> "We thus may not be confronted, factually, with a strict 'single-act' situation such as where an isolated offending product is the only contact between the defendant and the forum state. And we thus are not propelled *into the very center of the controversial area* of pure single act interstate situations where courts, on the constitutional issue, appear still *to reach varying results.*" 343 F. 2d at 189, citing many cases, state and federal, from all over the United States. (Emphasis added.)

And further, the *Aftanase* decision says, after reviewing the United States Supreme Court opinions from *International Shoe* to *Hanson v. Denckla:*

> "We also think it is fair to say that these five Supreme Court cases establish only general and not precise guidelines. Perhaps they purposely do no more than this." 343 F. 2d at 197.

In *Pendzimas v. Eastern Metal Prod. Co.,* 218 F. Supp. 524 (D. Minn., 1961) the Court realized it might not be correct in its ruling:

> "The Court is reluctant to depart from the holding of the Minnesota Supreme Court in the Atkins case, but we are confronted here with a Federal question, not a State question, and where the Minnesota Supreme Court assumes to depart with apparent unlimited lati-

tude from the pronounced weight of authority in determining the concepts of minimal contacts of a foreign corporation in a State necessary to sustain jurisdiction, I have concluded to follow the Mueller case *with the hope that this matter may reach the Court of Appeals and ultimately the Supreme Court so that the question finally may be set at rest.*" 218 F. Supp. at 529. (Emphasis added.)

Moore's Federal Practice discusses the conflict and confusion at considerable length and summarizes the situation:

> "If there are substantial contacts with the state, for example a substantial and continuing business, and if the cause of action arises of the business done in the state, jurisdiction will be sustained. If there are substantial contacts with the state, but the cause of action does not arise out of the contacts, jurisdiction may be sustained. If there is a minimum of contacts, and the cause of action arises out of the contacts, it will normally be fair and reasonable to sustain jurisdiction. *If there is a minimum of contacts and the cause of action does not arise out of the contacts,* there will normally be *no basis of jurisdiction,* since it is difficult to establish the factors necessary to meet the fair and reasonable test." 2 MOORE'S FEDERAL PRAC. § 4.25(5), p. 1173. (Emphasis added.)

There is much confusion and conflict in the application by lower courts, state and federal, of the standards set forth in the *International Shoe* and the *Hanson* cases. This Court has the opportunity with this case to clear away much of this confusion and conflict.

CONCLUSION

There is wide disagreement between the several states, between state courts and local U.S. District Courts, and among the 8th and 6th circuits as to the extent of these

territorial restrictions on the jurisdiction of the sovereign states. This case presents the ideal vehicle for resolution at this disagreement. The petitioner's Washington contacts are at an absolute minimum and were unrelated to respondent's cause of action. Further, unlike all other tort cases where jurisdiction was held to have been constitutionally obtained over a non-resident, there is here no defective product involved. Rather, petitioner, acting wholly and entirely without the State of Washington, marketed a product true in all respects to its label, which product found its way to Washington *after manufacturing processes conducted by others not parties to this action.* Petitioner respectfully submits that by accepting this case for decision, this Court will take a much needed step forward in a federal constitutional area presently beset with confusion, disagreement and conflict.

Respectfully submitted,

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